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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 632

DETROIT TRUST COMPANY (formerly Security Trust Company), a Michigan corporation, Executor of the Will of Cornelia O. Curtis, deceased,

Petitioner,

vs.

FRED L. WOODWORTH, Collector of Internal Revenue for the First District of Michigan,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF

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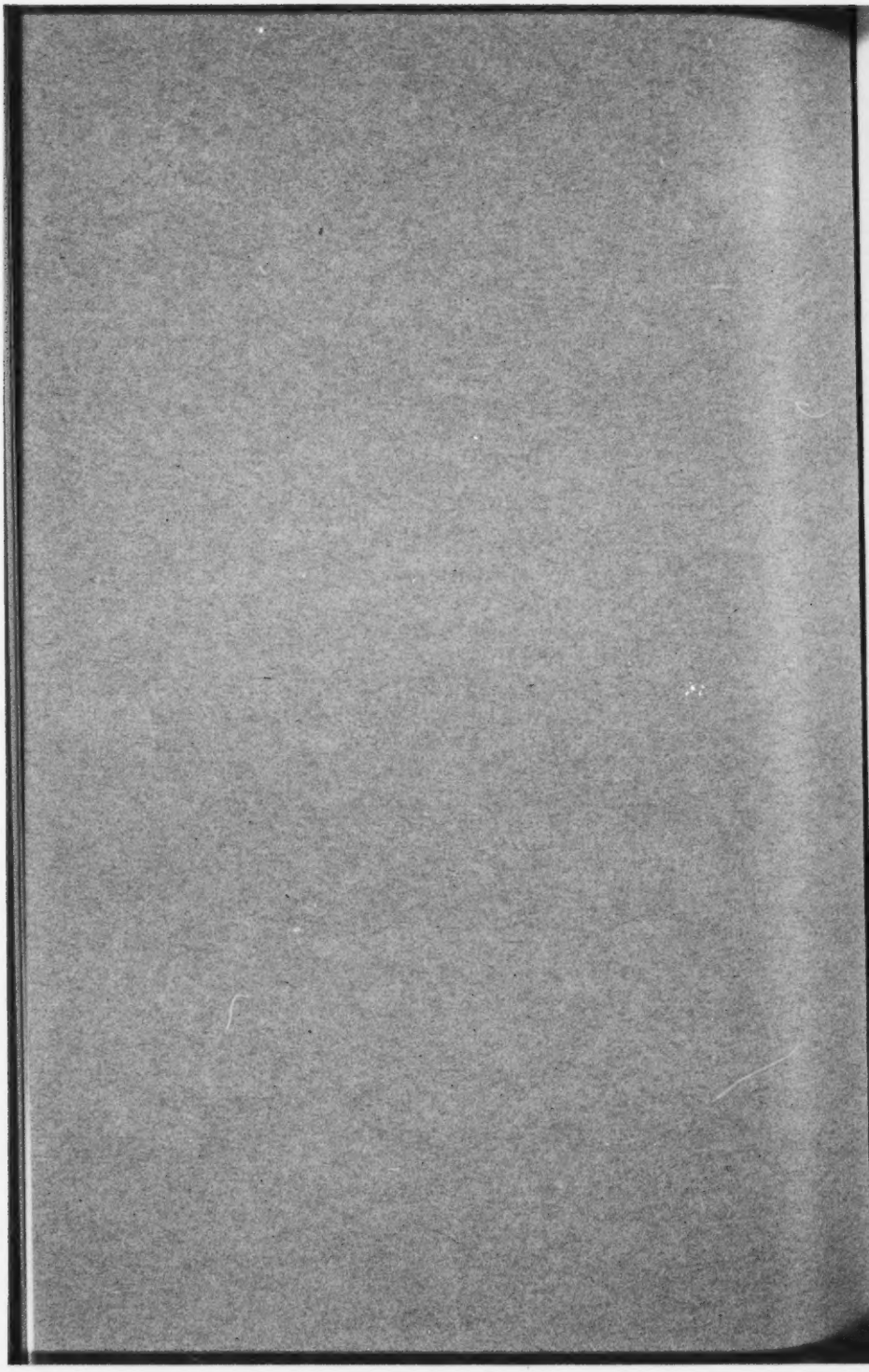
THE ENGLAND PRESS, DETROIT, MICHIGAN



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Petitioner,

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FRED L. WOODWORTH, Collector of Internal Revenue for the First District of Michigan,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

and

BRIEF IN SUPPORT THEREOF

DETROIT TRUST COMPANY (formerly Security Trust Company), a Michigan corporation, Executor of the Will of Cornelia O. Curtis, deceased, by its counsel, prays that a writ of certiorari issue to review the order of the United States Circuit Court of Appeals for the Sixth Circuit, entered on September 16, 1940, amending the mandate to order a new trial and otherwise denying the petitioner's motion to modify and clarify the mandate and to review the order of said court entered on October 16, 1940 denying the petitioner's motion to reconsider said order.

SUMMARY STATEMENT OF MATTERS INVOLVED

The petitioner instituted this suit in the District Court of the United States for the Eastern District of Michigan, on August 2, 1929. It was at issue shortly thereafter but was not called for trial until February 17, 1938, nearly nine years later.

The declaration, including the claims for refund, exhibits "A" and "B" attached thereto, states a cause of action for the recovery of the sum of $664,791.26, paid in two installments ($183,410.44 on September 5, 1924 and $481,380.82 on May 15, 1928) to the respondent as a deficiency income tax assessment for the year 1917, and interest accrued thereon, together with interest on such sum from the dates of payment thereof to the date of recovery thereof. (Declaration R. 5-30.) (Findings of Fact R. 48, 52.)

The respondent, Fred L. Woodworth, Collector of Internal Revenue for the First District of Michigan, appeared by the United States attorney, pleaded the general issue and gave notice of three affirmative defenses, the second and third of which were in the nature of pleas in confession and avoidance, as follows:

> Second Defense: The plaintiff voluntarily entered into a valid and binding contract, to-wit, a bond whereby the plaintiff elected to limits its right to contest the assessment to the manner set forth therein, and having paid the balance of the assessment in accordance with the terms of the bond, the plaintiff was barred from further contesting the assessment (Amendment to Defendant's Pleas, R. 44-45, Opinion of the Court, 110 Fed. 2d, 829).
>
> Third Defense: The plaintiff's action was barred by the Statute of Limitations. (Amendment to Defendant's Pleas, R. 45-49.)

By stipulation of counsel, made orally in open court, a jury was waived and the trial was limited to the issues

raised by the defendant's second and third affirmative defenses as set forth in the Amendment to Defendant's Pleas (Judgment R. 54, Stipulation R. 88).

The amount of damages is liquidated except for the computation of interest, the damages recoverable being the amount of $664,791.26 paid by the petitioner to the respondent on the illegal deficiency Income Tax assessment against petitioner's decedent for the year 1917.

The District Court filed special findings of fact, sustained the respondent's second and third affirmative defenses and entered judgment dismissing petitioner's action.

No bill of exceptions was filed because the facts as found by the court were not in dispute. Therefore the only issue before the Circuit Court of Appeals was the issue of the sufficiency in law of the special findings of fact to sustain the judgment of dismissal. (Opinion R. 79.)

The Circuit Court of Appeals reversed the judgment of the District Court and remanded the cause "for further proceedings in accordance with the opinion of this court." Neither the opinion nor the mandate, issued in pursuance thereof, specified or even indicated what further proceedings should be had. In this respect the opinion and mandate were ambiguous. (Opinion R. 76-81).

The petitioner filed a motion to modify and clarify the mandate to direct the entry of judgment for the petitioner on the grounds that a jury had been waived, the court had filed special findings of fact and the damages were a liquidated sum; therefore the court, on reversing the judgment for the defendant, should have directed the entry of judgment for the plaintiff. (R. 83-91). Respondent did not answer or otherwise appear in opposition to this motion.

Instead of granting the motion as prayed and directing

the entry of judgment for the petitioner, the Circuit Court of Appeals ordered a new trial. (R. 93).

Petitioner filed a motion to reconsider the court's order which was denied even though the respondent likewise did not answer or otherwise appear in opposition to this motion.

JURISDICTION

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (28 U. S. C. A. Sec. 347).

The orders of the Circuit Court of Appeals sought to be reviewed are the Order Amending the Mandate, entered September 16, 1940 (R. 93) and the Order denying Motion to Reconsider Order Amending Mandate, entered October 16, 1940. (R. 95). This petition for a writ of certiorari was filed on or before December 16, 1940.

At the time the petitioner filed its Motion to Modify and Clarify the Mandate, June 24, 1940, the time had already expired in which to petition for a writ of certiorari to review the decision of the court below on the merits of the case, filed March 14, 1940. But the court below had jurisdiction to recall, modify and clarify its mandate at any time during the term of court at which the judgment of reversal was entered.

Twin Falls Salmon River Land & Water Co. vs. Caldwell, 266 U. S. 85, 69 Law Ed. 178.

The petitioner's motion to modify and clarify the mandate was the proper method of invoking this jurisdiction.

Individual Drinking Cup Co. vs. Public Service Cup Co., 262 Fed. 410;

Epstein vs. Goldstein, 110 Fed. 2d, 747.

The court below did exercise this jurisdiction when on September 16, 1940 it entered an order amending the mandate to order a new trial. (R. 93). It further exercised this jurisdiction when it entertained, on October 16, 1940, and denied but did not dismiss petitioner's motion to reconsider said order amending the mandate. (R. 95).

This court has jurisdiction to issue a writ of certiorari to review an order granting a new trial.

Spiller vs. Atchison Topeka and Santa Fe Ry. Co., 253 U. S. 117, 64 Law Ed. 810.

QUESTION PRESENTED

Upon reversing a judgment for the defendant, should not the Circuit Court of Appeals, as a matter of law, direct the entry of judgment for the plaintiff, instead of ordering a new trial, in a case where a jury has been waived and the case tried by the court and where the court has filed special findings of fact, which are not in dispute since no bill of exceptions was filed; and, where the damages are a liquidated sum?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

In ordering a new trial, instead of directing the entry of judgment for the petitioner, the Circuit Court of Appeals has decided an important question of Federal Procedure, which has occurred on several occasions in the past and is likely to occur more or less frequently in the future, in conflict with the decisions of this court in *Fort Scott vs. Hickman*, 112 U. S. 150, 28 Law Ed. 636; *Allen vs. St. Louis National Bank*, 120 U. S. 20, 30 Law Ed. 573; *Cleveland Rolling Mill Co. vs. Rhodes*, 121 U. S. 255, 30 Law Ed.

920; *Forged Steel Wheel Co. vs. Lewellyn,* 251 U. S. 511 and in *Retzer vs. Wood,* 109 U. S. 185.

Said decision is also in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Oliver vs. Mt. Union Tanning and Extract Co.,* 264 Fed. 601 and in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Rathbone vs. Board of Commissioners of Kiowa County, Kansas,* 83 Fed. 125.

In ordering a new trial on its own motion and contrary to the motion filed by the petitioner, which motion was not opposed by the respondent, thereby subjecting the petitioner to the delays and expense and to the hazards of a second trial, more than eleven years after the case was instituted, when the only defenses the respondent considered worthwhile or necessary to litigate were based upon the statute of limitations and upon the terms of a bond given to secure the payment of the tax in question, which defenses were or should have been fully litigated upon the first trial, and in giving the respondent a second opportunity to produce other or additional evidence to sustain his defenses, the Circuit Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

We respectfully submit that a writ of certiorari should be granted.

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